

**IN THE COURT OF APPEALS OF IOWA**

No. 8-106 / 97-1176

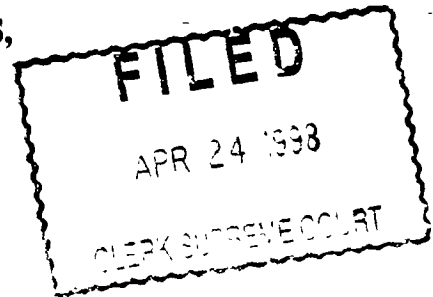
**BECKY JEAN BANGS and ARLAN MELOY BANGS,**

Plaintiffs-Appellees,

**vs.**

**MAPLE HILLS, LTD.,**

Defendant-Appellant.



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Appeal from the Iowa District Court for Des Moines County, John G. Linn,  
Judge.

Defendant appeals the jury verdict for plaintiffs in their slip and fall case.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Ted J. Wallace, Bettendorf, for appellant.

William Bauer of Bauer, Schulte, Hahn, Swanson & Brown, Burlington, for  
appellees.

Considered by Cady, C.J., and Huitink, and Streit, JJ.

**CADY, C. J.**

This is an appeal by a defendant challenging a jury verdict for plaintiffs in a slip and fall case. We affirm in part, reverse in part and remand for a new trial.

Becky Bangs was employed to perform home health care services for a tenant of Maple Hills, Ltd., an apartment complex. On February 25, 1994, Bangs stepped on a channel grate, a metal plate constituting a portion of the sidewalk. The channel grate sat on two L-shaped pieces of metal. The grate was designed to allow water to flow underneath the sidewalk. Bangs testified the metal grate tipped forward as she stepped on it, which caused her to fall and sustain injuries.

Bangs and her husband filed a tort action against Maple Hills. Plaintiffs alleged defendant was negligent in failing to properly maintain the grate and in failing to warn pedestrians. A jury assigned fault ninety-nine percent to Maple Hills and one percent to Bangs. Bangs was awarded damages of \$115,942.99 and her husband was awarded damages of \$29,950. The district court denied defendant's post-trial motions. Defendant now appeals.

**I.** Maple Hills contends the district court should have granted its motion for directed verdict. Defendant claims plaintiffs failed to show it either knew of the defective condition of the grate or had a reasonable opportunity to discover the condition.

In reviewing a ruling on a motion for directed verdict, we consider whether there was sufficient evidence to generate a jury question. *Jackson v. State Bank of*

*Wapello*, 488 N.W.2d 151, 155 (Iowa 1992). Richard Snider, the maintenance supervisor of the apartment complex, testified the grate had been out of its housing about six times in the previous fifteen years. Bangs testified Linda Lozano, the apartment manager, told her the grate fell all the time. We determine there was sufficient evidence defendant was aware of the condition of the grate to submit the case to the jury.

II. Prior to the trial, the court granted defendant's motion in limine and prohibited plaintiffs from presenting evidence of subsequent remedial measures. After the accident, the grate was welded to the two L-shaped pieces of metal. In compliance with the order, no evidence was presented that the grate had been welded into place. Plaintiff presented no evidence that defendant should have welded the grate.

During the closing arguments, which were not recorded, plaintiffs' counsel argued defendant could have easily fixed the grate by welding it down. Defense counsel then argued in his closing argument that welding the grate would not work because it would destroy its function--the grate was removable to allow for cleaning of debris underneath. Plaintiffs' counsel objected to defense counsel's closing argument and stated he believed defense counsel should be required to withdraw those statements and correct the record. The court then suggested, sua sponte, plaintiffs be allowed to reopen the record to admit photographs which showed the grate had been welded. The record was then reopened and photographs were

admitted showing the welded grate. Plaintiff testified the photographs accurately depicted the grate at the time of her fall except for the weld spots.

A trial court is granted a broad range of discretion in determining the admissibility of evidence. *Eldridge v. Casey's General Stores, Inc.*, 533 N.W.2d 569, 570 (Iowa App. 1995). We review for an abuse of discretion. *Id.*

We find the district court abused its discretion in this case. Under Iowa Rule of Evidence 407 subsequent remedial measures are not admissible for the purpose of establishing a defendant's negligence. *McIntosh v. Best Western Steeplegate Inn*, 546 N.W.2d 595, 597 (Iowa 1996). The rule, however, does not exclude evidence of subsequent measures when, inter alia, offered for the purpose of proving such issues as feasibility of precautionary measures, if controverted, or impeachment. I.R.E. 407.

In this case, there was no evidence produced about welding the grate until plaintiffs were permitted to reopen their case. Thus, at the time the closing statements were presented, the feasibility of welding the grate was not a contested issue. In fact, it had not been raised as an issue in the case. Issues are framed by the pleadings and the evidence, not the closing argument. Likewise, there was no evidence in the record to impeach. Closing arguments are not evidence. Thus, the exceptions to Rule 407 were never implicated.

We recognize a defendant can lose the protection provided by Rule 407 by contesting a plaintiff's claim of the feasibility of remedial measures. However, the claim must first be raised by the plaintiff through evidence that defendant breached

a duty of care in failing to perform the remedial measures. If defendant then contests the feasibility of such remedial measures, the plaintiff can respond by introducing evidence of the remedial measures that were taken by the defendant. Rule 407 is a rule of evidence, and is not activated by argument.

The trial court abused its discretion by permitting plaintiff to inject the issue of subsequent remedial measures based on comments made by the attorneys in closing argument. Not only was this contrary to the exception to Rule 407, it was done in such a manner and at a time that the risk of misuse of the evidence by the jury was enhanced.

We conclude the admission of the photographs and the accompanied testimony was prejudicial. We reverse and remand for a new trial.

**III.** Defendant contends the district court should have given different jury instructions. Defendant objected to language in one instruction and requested three instructions which were not given. An error in giving or refusing to give an instruction does not require reversal unless the error is prejudicial. *Sunrise Developing Co. v. Iowa Dept. of Transp.*, 511 N.W.2d 641, 644 (Iowa App. 1993).

The jury instructions given in this case were uniform jury instructions. Defendant does not allege its theories were not presented to the jury. We determine the jury instructions adequately explained the concept of the law in this case.

We affirm the district court decision to deny a directed verdict and we affirm the jury instructions given in the case. We reverse the jury's verdict and remand for

a new trial based on the admission of photographs showing subsequent remedial measures. We do not retain jurisdiction. Costs of this appeal are assessed one-half to each party.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**